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No. 82-6865

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ASKARI ABDULLAH MUHAMMAD,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION TO JURISDICTION

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QUESTION PRESENTED

WHETHER THE DEFENDANT HAS PRESENTED ANY SUBSTANTIAL FEDERAL QUESTION WARRANTING THE EXERCISE OF THIS COURT'S JURISDICTION?

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PREFACE

The Petitioner, was the Appellant in the Supreme Court of Florida and the defendant in the trial court. The Respondent, The State of Florida, was the Appellee in the Supreme Court of Florida and the prosecution in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following reference is made in this brief:

(A) For the portions of the record attached to the present Brief of the Respondent in opposition to jurisdiction.

I

OPINIONS BELOW

The original opinion of the Supreme Court of Florida affirming the Defendant's convictions for first degree murder and sentences of death is reported at Knight v. State, 338 So.2d 201 (Fla. 1976). The opinion of the Supreme Court of Florida rejecting the Defendant's attack upon his appellate counsel is reported at Knight v. State, 394 So.2d 997 (Fla. 1981). The opinion of the Supreme Court of Florida rejecting the Defendant's attack upon his trial counsel and various other complaints is reported at Muhammad v. State, 426 So.2d 533 (Fla. 1982). The West Publication "Southern Reporter" is the official Reporter for citation to these opinions.

II

JURISDICTION

The Defendant claims jurisdiction based upon 28 U.S.C. §1257(3).

III

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Defendant in his brief at his "Appendix E" recites various Florida Statutes governing the present convictions and sentences. The Defendant claims error additionally based upon the Eighth and Fourteenth Amendments of the United States Constitution. The Defendent however, has failed to recite said provisions. The Eighth Amendment provides that:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides *inter alia* that:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IV

SUMMARY OF ARGUMENT

The Defendant's claims present no substantial federal question and the Defendant presents no special or compelling reasons for granting the writ.

V

ARGUMENT

The Defendant asserts two grounds for the exercise of this Court's jurisdiction: 1) That §921.141 Fla.Stat. limits the consideration of mitigating circumstances to those enumerated in the statute and 2) that the State trial court in its 1975 sentencing order improperly considered certain statutory aggravating circumstances within the meaning of Barclay v. Florida, U.S. Sup.Ct. Case No. 81-6908, cert granted, __U.S.__, 103 S.Ct. 340 1982).

First of all, the Defendant has made some grave factual omissions in his Statement of Facts, which are misleading. In particular, the Defendant seems to pretend that there was some issue of the sufficiency of the evidence below. To the contrary, the evdience against him was nothing less than conclusive and overwhelming. He was succintly identified by numerous eyewitnesses as the perpretator of the kidnapping; the victims and the Defendant were followed in the victims' vehicle to a wooded area; after the wooded area was sealed off and the victims had been brutally murdered the Defendant was found in a small hole in the ground where he had attempted to conceal himself; his clothing was spattered with the victims blood and he was in possession of the murder weapon and the marked ransom from the bank. See, Knight v. State, 338 So.2d 201, at 202 (Fla. 1976). The Defendant's suggestion through his counsel at this late stage, was that the evidence was somehow insufficient is frivolous and should be soundly

rejected by this Court.

As reflected in the attached Exhibit A appended hereto which consists of the Defendant's Brief in the Supreme Court of Florida upon the direct appeal from the summary denial of his motion pursuant to Rule 3.850 Fla.R.Crim.P., the Defendant neither briefed nor argued the present limitation of mitigation argument. Contrary to the Defendant's assertion, the Supreme Court of Florida did not address this issue on the merits. This Court, should therefore considered the present complaint waived and therefore inappropriate as a jurisdictional basis in this Court. See Steagald v. United States, __U.S.__, 101 S.Ct. 1642 (1981); United States v. Mendenhall, 446 U.S. 544, at 560, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)(Justices Powell and Blackman and the Chief Justice concurring in part); See also Henderson v. Kibbe, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed. 2d 203 (1977). Additionally, the Defendant has failed to show any cause or prejudice to go around counsel's procedural default in failing to raise the present issue in the trial court in 1975. See Wainwright v. Sykes, 433 U.S. 72 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). The present case is therefore neither properly preserved nor properly postured for this Court's review of these issues. There is no showing of actual prejudice which infected the entire proceeding with error of constitutional dimension and in fact a reasonable jury when considering the instructions as a whole would not have considered the mitigating circumstances limited as the Defendant contends. See Ford v. Strickland, 696 F.2d 804, at 811-813 (11th Cir. 1983) (en banc). In any event, this Court has expressly recognized

that the Florida Statute does not limit a jury's consideration of mitigating circumstances to those listed in the statute. Id; See Profitt v. Florida, 428 U.S. 242, at 250, in 8, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). The Defendant has failed to show any substantial basis for the exercise of this Courts present jurisdiction.

With respect to the issue under Barclay v. Florida, this issue has not been raised in any proceeding below. In any event, this Court rejected the Defendant's complaint in Zant Stephens, U.S. Sup. See Case. No. 81-89, Opinion filed June 22, 1983. In the present case as in Stephens, there is at least one aggravating circumstance and proper appellate review insuring proportionality.

Moreover, the argument under Barclay is not applicable in the present circumstance. The Supreme Court of Florida has not stricken any of the four statutory aggravating circumstances in the present case and there were no statutory mitigating circumstances in the present case. Under Florida law, the present sentence is therefore both proper and consistent. See, eg, Proffitt v. Florida, supra, (no mitigation); State v. Dixon, 283 So.2d 1, at 9 (Fla. 1973); See also, Fleming v. State, 374 So.2d 954 (Fla. 1979); Hargrave v. State, 366 So.2d 1, at 5 (Fla. 1979); Gibson v. State, 351 So.2d 948 at 951 (Fla. 1977); LeDuc v. State, 365 So.2d 149, at 152 (Fla. 1978); Jackson v. State, 359 So.2d 1190, at 1194-1195 (Fla. 1978); Darden v. State, 329 So.2d 287, at 291 (Fla. 1976); Douglas v. State, 328 So.2d 18, at 21-22 (Fla. 1976). The Florida Death Penalty process under

§921.141 Fla.Stat. is not a mechanical list, but rather is based upon a "reasoned judgment" upon the facts of each case. See Proffitt v. Florida, 28 U.S. at 250-251; 256-257, n.8 and n.14; Elledge v. State, 346 So.2d 998 at 1002-1003 (Fla. 1977); Dixon, 283 So.2d at 10. That principle was soundly exercised in the present case, particularly in view of the fact that there was no statutory mitigation. Therefore, the present case does not even remotely warrant the exercise of this Court's jurisdiction.

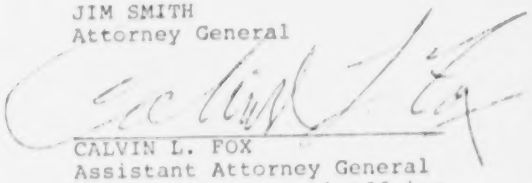
V

CONCLUSION

WHEREFORE, upon the foregoing, the Respondent, THE STATE OF FLORIDA, prays that this Honorable Court will issue its order affirming the judgment below.

RESPECTFULLY SUBMITTED, on this 1st day of July, 1983, at Miami, Dade County, Florida.

JIM SMITH
Attorney General



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